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No. 1002

In The

Supreme Court of the United States

OCTOBER TERM 1969

GEORGE RIVERA SANTANA,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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INDEX

	Page
Index of Authorities	ii
Citations to Opinions Below	2
Grounds on Which Jurisdiction is Invoked	2.
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case:	
1. Material Facts	3
2. How Federal Questions Were Presented in the State Court	5
Reasons for Granting the Writ	8
Conclusion	12
Appendices	13

INDEX OF AUTHORITIES

Page

DeBacker v. Brainard,
183 Neb. 461, 161 N.W.2d 508, appeal dismissed 6 Cr. L. 2074, ... U.S. ....., (1969) (circumstances inappropriate to consider question) 9

In re Dennis M.,
75 Cal. Rptr. 1,
450 P.2d 296 (1969) 9

In re Ellis,
253 A.2d 789 (D.C. Cir. 1969) 9

In re Gault,
387 U.S. 1 (1967) 8, 10

In re Samuel W.,
247 N.Y.2d 196, 299 N.Y.S.2d 414,
247 N.E.2d 253, probable jurisdiction noted,
No. 85 Misc, ... U.S. ..... (October 27, 1969) 9

In re Urbasek,
38 Ill.2d 535,
232 N.E.2d 711 (1968) 9

Jones v. Commonwealth,
185 Va. 335,
38 S.E.2d 444 (1946) 9

INDEX OF AUTHORITIES—(Continued)

Page

Speiser v. Randall,
357 U.S. 513 (1958) 9

State v. Arenas,
453 P.2d 915 (Ore. 1969) 10

United States v. Costanzo,
395 F.2d 441 (4th Cir. 1968) 8, 9

Constitutional Provisions:

Sixth Amendment to the
Constitution of the United States 3

Fourteenth Amendment to the
Constitution of the United States 3

Statutes:

Tex. Code Crim. Proc. §28.10 (1965) 11

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OCTOBER TERM 196[illegible]

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THE STATE OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, George Rivera Santana, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Teas in the above entitled cause on July 23, 1969. (Petitioner's Motion for Rehearing in said cause having been denied by the Supreme Court of Texas on October 1, 1969).

I. REPORT OF THE OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Texas, printed in Appendix A hereto, *infra*, page 13, is reported in 444 S.W. 2d 614. The opinion of the Court of Civil Appeals of the Court of Civil Appeals for the Seventh Supreme Judicial District in Amarillo, Texas, printed in Appendix B hereto, *infra*, page 54, is reported in 431 S.W. 2d 558.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The final judgment of the Supreme Court of Texas was rendered and entered on July 23, 1969, Appendix A hereto, *infra*, Page 13.

2. The order denying petitioner's Motion for Rehearing by such Supreme Court was rendered and entered on October 1, 1969, Appendix C hereto, *infra*, Page 60.

3. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

III. QUESTIONS PRESENTED

1. Whether Petitioner has been denied due process and equal protection of the laws, as guaranteed him by the Fourteenth Amendment to the Constitution of the United States, by the Texas Supreme Court's holding that the proper quantum of proof in a juvenile delinquency proceeding involving loss of liberty was by a preponderance of evidence, rather than by the reasonable doubt standard.

2. Whether Petitioner has been denied due process and equal protection of the laws, as guaranteed him by the Sixth and Fourteenth Amendments to the Constitution of the United States, by the Texas Supreme Court's holding that Petitioner was given adequate notice of the basis of the allegation of delinquency when the State was allowed to amend its pleadings after the jury panel had been sworn, changing the charge from assault with intent to rape to the charge of rape.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the Constitution of the United States, the pertinent portions of which read as follows:

Sixth Amendment:

> "In all criminal prosecutions, the accused shall be entitled to . . . be informed of the nature and cause of the accusation; . . ."

Fourteenth Amendment:

> ". . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V. STATEMENT

1. MATERIAL FACTS:

Respondent, The State of Texas, acting by and through

the County Attorney of Lubbock County, Texas, instituted proceedings in the 99th District Court of Lubbock County, sitting as a juvenile court, to declare Petitioner a delinquent child. The act of delinquency charged was the violation of a penal law of the State of Texas.

In answer to two special issues, a jury found that from a preponderance of the evidence, Petitioner had committed the offense of rape and that he was a delinquent child.

On the day of the trial, after the jury panel had been sworn, Respondent, over objection, was allowed to file a trial amendment changing the charge from assault with intent to rape to the charge of rape. An exception was taken to the ruling of the trial court allowing same. (Bill of Exception, p. 2 & 3).

In answer to two special issues the jury found that from a preponderance of the evidence, Petitioner had committed the offense of rape, and that he was a delinquent child. The trial court entered an order of commitment directing that Petitioner be placed under the authority and control of the Texas Youth Council.

Petitioner objected to the action of the trial court in allowing the State to file the trial amendment (Tr. 10). In his Original and Amended Motions for New Trial, Petitioner renewed this complaint and also complained of the preponderance of evidence submission (Tr. 37, 38, 40). The trial court overruled the objection to the trial amendment. The Original and Amended Motions for New Trial were overruled by operation of law. Judgment was entered against Petitioner and in favor of Respondent (Tr. 27).

The Court of Civil Appeals for the Seventh Supreme Judicial District of Texas held that Petitioner, having been proved delinquent by a preponderance of the evidence, was denied due process and equal protection guaranteed by the Fourteenth Amendment, and reversed and remanded the case. In view of its disposition of the case, that court did not consider Petitioner's contention that he did not receive adequate notice of the charges against him.

The Supreme Court of the State of Texas reversed the judgment of the Court of Civil Appeals and affirmed the trial court's decision, holding that the reasonable doubt quantum of proof is not required in juvenile trials and that it was not error to allow Respondent to file the trial amendment, on the basis that *In re Gault*, 387 U.S. 1 (1967), does not require that the juvenile trial be adversary and criminal in nature.

2. HOW FEDERAL QUESTIONS WERE PRESENTED IN THE STATE COURTS:

The Constitutional and Federal questions forming the basis of this petition to this Honorable Court were urged upon the state courts as follows:

Petitioner first raised Federal questions in his objections to State's Trial Amendment (Tr. 10):

> "Further, George Rivera Santana objects to the trial amendment for the reason that it fails to apprise him of the charges made against him and doing so denies him due process of law."

This objection was overruled (Tr. 11).

Petitioner renewed the objection to the trial amendment in his Amended Motion for New Trial:

"IV.

The Court erred in overruling the defendant's objections to the State's trial amendment since the defendant was not properly served with notice prior to the commencement of the proceedings against him, and such failure denied to him the requirements of due process of law which guarantees notice of the charge brought against an accused in adequate time to prepare a defense, each of which were denied by the granting of the State's trial amendment captioned "Second Amended Original Petition," the same constituting the "Third Amended Original Petition."

Petitioner made objection to the use of the preponderance evidence quantum of proof in his Amended Motion for New Trial:

"XVII.

The Court committed fundamental error and deprived to the defendant due process of law as guaranteed by both the Texas and the Federal Constitution when it failed to require the State to prove its case against the defendant beyond a reasonable doubt."

The above two objections were overruled by operation of law on April 17, 1967.

Thereafter, Petitioner timely perfected his appeal through the appellate courts of the State of Texas, preserving substantially the above two points of error. These

points were presented to the Supreme Court of Texas in Petitioner's Motion for Rehearing in that court, in the following manner:

"POINT OF ERROR NO. TWO

THE SUPREME COURT ERRED IN HOLDING THAT THE TRIAL COURT PROPERLY ALLOWED THE STATE TO FILE A TRIAL AMENDMENT ON A MATERIAL MATTER SINCE AN OFFER OF POSTPONEMENT ADEQUATELY PROTECTED THE CONSTITUTIONAL RIGHTS OF RESPONDENT AS GUARANTEED BY THE FOURTEENTH AMENDMENT, WHEN THE BILL OF EXCEPTION SHOWS THE CONTRARY."

"POINT OF ERROR NO. THREE

THE SUPREME COURT ERRED IN HOLDING THAT THE QUANTUM OF PROOF TEST OF "BEYOND A REASONABLE DOUBT" IS NOT AN ESSENTIAL PART OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IN JUVENILE HEARING INVOLVING LIBERTY."

"POINT OF ERROR NO. FOUR

THE SUPREME COURT ERRED IN HOLDING THAT THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION ALLOWS THE GUILT OR INNOCENCE OF A JUVENILE TO BE DETERMINED BY A JURY ON A PREPONDERANCE OF EVIDENCE WHERE HIS LIBERTY IS INVOLVED."

"POINT OF ERROR NO. FIVE

THE SUPREME COURT ERRED IN HOLDING THAT JUVENILES COULD BE TRIED UPON A DIFFERENT STANDARD OF PROOF THAT WOULD BE AVAILABLE TO AN ADULT SIMILARLY CHARGED SINCE THAT DENIED RESPONDENT THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE UNITED STATES CONSTITUTION."

The Supreme Court of Texas refused and denied Petitioner's points of error when it reversed the decision of the Court of Civil Appeals (Appendix A hereto, *infra*, p. 13), and when it refused Petitioner's Motion for Rehearing (Appendix C hereto, *infra*, p. 60).

VI. REASONS FOR GRANTING THE WRIT

1. The decision of the Texas Supreme Court has the effect of allowing Petitioner, a juvenile, to be found guilty of a crime and deprived of his liberty on a lesser quantum of proof that would be an adult in similar circumstances, thus denying petitioner due process and equal protection of law as guaranteed him by the Fourteenth Amendment.

The holding below is in direct conflict with *United States v. Costanzo*, 395 F. 2d 441 (4th Cir. 1968), which held that a federal juvenile proceeding which may lead to institutional commitment must be regarded as "criminal," and that the reasonable doubt standard was applicable just as it is in adult prosecutions. The holding below also conflicts in principle with *In re Cault*, 387 U.S. 1 (1967), in that the finding of Petitioner's guilt on a preponderance

of evidence standard deprived him of a safeguard which is implicit in the concepts of due process and fair treatment.

A fundamental principal firmly entrenched in our system of jurisprudence is that a man is presumed innocent of a crime until proven guilty beyond a reasonable doubt. Where loss of liberty is involved it seems unreasonable to deny a juvenile this basic protection which is accorded an adult. In *Speiser v. Randall,* 357 U.S. 513 (1958), the following statement is found:

> It is of course within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, *unless* in so doing, it offends some principle of justice *so rooted in tradition and conscience of our people* as to be ranked as fundamental. (emphasis added).

The question of the proper quantum of proof has been deemed sufficiently important to merit consideration by several appellate courts. In the following decisions, the reasonable doubt standard has been held applicable to juvenile delinquency proceedings: *DeBacker v. Brainard,* 183 Neb. 461, 161 N.W. 2d 508, *appeal dismissed,* 6 Cr. L. 2074, ... U.S. ..... (1969) (circumstances inappropriate to consider question); *United States v. Costanzo,* 395 F.2d 441 (4th Cir. 1968); *In re Urbasek,* 38 Ill. 2d 535, 232 N.E. 2d 711 (1968); and *Jones v. Commonwealth,* 185 Va. 335, 38 S.E. 2d 444 (1946). Conversly, several recent decisions have sanctioned the use of the preponderance of evidence standard: *In re Ellis,* 253 A. 2d 789 (D.C. Cir. 1969); *In re Dennis M.,* 75 Cal. Rptr. 1, 450 P. 2d 296 (1969); *In re Sammuel W.,* 247 N.Y. 2d 196, 299 N.Y.S.

2d 414, 247 N.E. 2d 253, *probable jurisdiction noted*, No. 85 Misc., ... U.S. ..... (October 27, 1969); and *State v. Arenas*, 455 P. 2d 915, (Or. 1969). In this respect, it must be noted that there is a conflict between *Constanzo* (4th Circuit) and *In re Ellis* (District of Columbia Court of Appeals). In addition, Texas does not have a statute concerning the quantum of proof to be applied. In this connection, the other state court decisions differ from the one in this case, in that those decisions have been able to rely on state statutes expressly sanctioning the preponderance of evidence standard. Thus Texas has a judicial rather than a legislative classification.

Petitioner has stood before the bar, stating that he is innocent, and that he does not need or desire the protection afforded juvenile delinquents by the state and the consequent denial of his liberty. Petitioner urges that denominating juvenile delinquency proceedings as civil in nature rather than criminal should not result in the denial of this fundamental right.

2. The holding of the Texas Supreme Court that the State was properly allowed, on the day of the trial, to file a trial amendment changing the charge from assault with intent to rape to rape in effect disregards the notice of charges provision of the Sixth Amendment, thus denying Petitioner due process of law. The decision on this point is in direct conflct with *In re Gault*, 387 U.S. 1 (1967), which made such notice requirements applicable to state juvenile delinquency proceedings.

In *Gault, supra*, at 387 U.S. 33, Mr. Justice Fortas, for the majority, stated:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled

> court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity.....Due process of law requires notice that we have just described — that is, notice which would be constitutionally adequate in a civil or criminal proceeding.

Had this been an adult criminal prosecution, the amendment to the indictment or information would be prohibited under Texas law, as amendments on matters of substance are prohibited. TEX. CODE CRIM. PROC. §28.10 (1965). In such situations, the State must start anew with a new indictment or information. The statute is but a manifestation of the constitutional right to notice of charges. Even if juvenile proceedings are termed 'civil' in nature, it is plain that in both instances a crime is charged and the proceedings are adversary in nature. Thus the distinction between 'civil' and 'criminal' is, in this regard, somewhat tenuous.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court Below

IN THE SUPREME COURT OF TEXAS

No. B-4132

THE STATE OF TEXAS

Petitioner

v.

GEORGE RIVERA SANTANA

Respondent

From Lubbock County

Seventh District

The problem in this juvenile proceeding is the quantum of proof required: The jury found, from a preponderance *of the evidence*, that George Santana, age 14 at the time of the trial, committed rape upon Irene Nino and that he was a delinquent child. He was committed to the Texas Youth Council. The contention is that the use of "the preponderance of the evidence" is no longer permissible; and that under the *Gault* decision of the Supreme Court of the United States, the findings must be beyond a reasonable doubt as in criminal cases. In re Gault, 387

U.S. 1 (1967). The Court of Civil Appeals agreed with the contention. It reversed in the light of *Gault*, 431 S.W. 2d 558. We granted a writ of error to review that holding. A second point, not reached by the Court of Civil Appeals, is whether the State could amend its petition before trial. We must deal with that contention also.

Counsel for Santana did not object to the wording of the jury issues on the ground that they called for answers based upon a "preponderance of the evidence." Nor did counsel ask for or submit requested issues for the jury based upon the quantum of proof "beyond a reasonable doubt." The point was raised for the first time on motion for new trial as fundamental error. In the ordinary civil case, the alleged error in the charge to the jury would be considered as waived. But in view of the constitutional importance of this case to the public generally, and in view of the fact that juvenile proceedings are not designed to be conducted as ordinary adversary proceedings, the point raises a question of fundamental error, and it will be so treated. *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W. 2d 979 (1947); *McCauley v. Consolidated Underwriters*, 157 Tex. 475, 304 S.W. 2d 265 (1957).

The opinion in *Gault* made a wide and critical analysis of juvenile proceedings. The tone of the opinion is that minors as well as adults are entitled to basic constitutional protection. It dealt with six subjects; and as to the first four, it was held that the minor was entitled to constitutional protection: notice of charges; right to counsel; right to confrontation of witnesses and of cross-examination; and privilege against self-incrimination. It reserved the questons of a right to a transcript of the proceedings, and right to an appellate review. The only one of these ele-

ments raised here deals with adequate notice of the charges. This relates to the amendment of the State's petition before trail. Moreover, Santana had a trial by jury, a right still withheld in some states in juvenile cases. In *Gault*, the minor was committed for a maximum of six years; while for the same offense (obscene phone calls) the punishment for an adult was a fine of $50 and two months in jail. The maximum here for Santana is seven years of detention. For an adult the maximum punishment for the same offense (rape) is death or life imprisonment.

The minor involved in *Gault* was not tried under the "beyond a reasonable doubt" rule. The Arizona law called for findings by "clear and convincing evidence." When the United States Supreme Court remanded the cause for the equivalent of a new trial, it expressly did not pass upon whether "beyond a reasonable doubt" was required by the Constitution of the United States. It said, "We shall not consider other issues which were passed upon by the Supreme Court of Arizona. We emphasize that we indicate no opinion as to whether the decision of that court with respect to such other issues [including 'beyond a reasonable doubt"] does or does not conflict with requirements of the Federal Constitution." The Supreme Court also declined to pass upon the question in *In re Whittington*, 391 U.S. 341 (1968).

It is strongly urged here and in some contemporaneous writings that the opinion in *Gault* means that a juvenile proceeding which may end in depriving a person of his liberty is, in reality, a criminal trial; and that to satisfy the due process and equal protection clauses, juvenile proceedings must be accompanied by *all* of the *same*

measures and *protections afforded in criminal trials.* We do not so read *Gault.* The *Gault* opinion goes out of its way to say it does *not* mean to so hold. It quotes from *Kent v. United States,* 383 U.S. 541, 562 (1966).

> "We do not mean . . . to indicate that the [juvenile] hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."

The *Gault* opinion then states, "We reiterate this view. . . ." The Court sets out many of the desirable features of juvenile hearings such as the processing and treatment of juveniles separately from adults and the special juvenile court procedures which avoid classifying the juvenile as a "criminal." The conclusion stated in *Gault* is that "the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication"; and "There is no reason why the application of due process requirements should interfere with such provisions."

The facts in *Gault* were extreme, and the material reviewed by the Supreme Court of the United States indicated to it that much of the good intended by juvenile proceedings was being poorly carried out at least in some areas including Arizona.

The Court reviewed the history of juvenile treatment and recalled that as the juvenile acts were designed, it was *not* the goal of the State to determine whether a child was guilty or innocent, but to determine what is he, how has he become what he is, and what had best be done in his

interest and in the interest of the State to save him from a downward career. The child, essentially good, was to be made to feel that he was the object of the State's care and solicitude, not that he was under arrest or on trial. The rigidities, technicalities, and harshness of the criminal law were altogether inapplicable. The idea of crime and punishment was to be abandoned. The child was to be treated and rehabilitated. Moreover, no permanent public record was made of his hearing or trial so that the child would not be branded as a criminal simply because he was subject to the help and discipline of the state.

Under the Texas act, no adjudication of the status of any child may operate to impose any civil disabilities ordinarily imposed by convicton, "nor shall any child be deemed a criminal . . . , nor shall any child be charged with or convicted of any crime in any court. The disposition of the child or any evidence given in the court shall not be admissible as evidence against the child in any case . . . other than another Juvenile Court, nor shall such disposition or evidence operate to disqualify a child in any future civil service examination, appointment or application." Art. 2338-1 §13(3).

The *Gault* opinion recognized, or at least reserved judgment on, the policy of the juvenile court system. It declined to announce that they were either criminal or civil courts, rather recognizing that they were *sui generis*. It did make it plain that the system was being badly abused in some areas so that many children, not properly treated as juveniles, were not given the protection of adults, and got "the worst of both worlds." And, on many occasions, instead of getting the kindly father approach from the judge, a child was often whisked away to the equivalent

of a prison in what amounted to Star Chamber proceedings "His world becomes 'a building of white-washed walls, regimented routine and institutional laws . . . 'Instead of mother and father . . . his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide." 387 U.S. at 27.

At the darkest point in this bleak picture masterfully painted by Mr. Justice Fortas is the thundering statement that "Under our Constitution, the condition of being a boy does not justify a kangaroo court."

To correct the kangaroo court approach, the *Gault* opinion announced basic constitutional guarantees for juvenile proceedings, whether they be civil, criminal, or *sui generis:* adequate notice, right to counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination.

We ascribe to the *Gault* court not a desire to abolish the attempt of the state to treat and rehabilitate the child through juvenile proceedings, but a laudable mandate that in juvenile proceedings, the rights of the child be preserved; that the proceedings be conducted with basic fairness. Instead of the *worst* of both worlds under the abused juvenile proceedings, the *Gault* court, it is thought, desired to preserve the *best* of both worlds for the minor; i.e., the individual, particularized treatment of the disturbed, rebellious or wayward minor, while at the same time, insuring that the hearings be conducted with dignity and fairness and with the essentials of due process being observed.

We accept this view. This Court originally upheld the

validity of the Texas Juvenile Act upon this basis in *Dendy v. Wilson,* 142 Tex. 460, 179 S.W. 2d 269 (1944). And while recognizing the benefits of the separate treatment of juveniles, this Court there held that the rights of the minors were there violated because they were compelled to give testimony against themselves. Similarly in *Steed v. State,* 143 Tex. 82, 183 S.W. 2d 458 (1944), while holding that the rules of civil, rather than criminal, procedure would be applicable to juvenile proceedings, we again reversed the particular proceedings because the charges filed against the juvenile were not definite enough to afford fair notice to the minor and his parents. And while we must accept as true much of the dismal picture painted in *Gault* as to the abuses of the juvenile system, we are not prepared to condemn out of hand the Texas Youth Council, the juvenile judges, and other trained people working in this field. The policy of the juvenile laws has been fixed by the Texas Legislature; and we conceive it to be our duty to uphold the spirit of that law while at the same time insuring to minors the basically fair proceedings required by *Gault* and the constitutions of Texas and of the United States.

So it boils down to this: are juvenile proceedings hereafter to be true adversary proceedings like the ordinary criminal trial? Must the juvenile be "convicted" upon a finding of guilt beyond a reasonable doubt? Is the quantum of proof "beyond a reasonable doubt" so essential that its absence, in a juenile case involving loss or curtailment of liberty, is a denial of constitutional rghts? Or may the State be able to assist youth in these *sui generis* proceedings where the finder of fact, the judge or jury, is convinced by a preponderance of the evidenc that acts

have been committed, that the child is a delinquent, and that he needs the help of the State?

The problem now before us has been before the highest courts of other states, and the United States Supreme Court has noted jurisdiction in one of the cases. The courts of our sister states are not uniform; and in most instances, there is a dissent among the justices.

The Supreme Court of Illinois in *In re Urbasek*, 232 N.E. 2d 716 (1968), absorbed the dark picture of *Gault*, equated juvenile trials to adversary criminal trials, and held that it would be a denial of due process and equal protection to afford less safeguards to minors than to adults who were on trial for crimes. It recognized that it was adopting "what has heretofore been the minority view point as to the quantum of evidence required in delinquency hearings," but it was persuaded by the implications of *Gault*. The holding was that the proof must be "beyond a reasonable doubt."

Similarly the U.S. Court of Appeals for the 4th Circuit in *United States v. Costanzo*, 394 F. 2d 441 (1968) stated the question and answered it as follows:

> "Our precise question then is whether for purposes of the required quantum of evidence, no less than for notice, counsel, cross-examination, and the privilege against self-incrimination, a federal juvenile proceeding which may lead to institutional commitment must be regarded as 'criminal.' We hold that it must be so regardded. No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. See Gault, supra at 50, 87 S.Ct. 1428. The Government's

> burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt,' just as in a prosecution against an adult. We see a compelling similarity between the enumerated safeguards due a juvenile in as full measure as an adult and the requirement of proof beyond a reasonable doubt. In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection; and if young and old are entitled to equal treatment in the one respect, we can think of no reason for tolerating an inequality in the other." 394 F. 2d at 444 (1968).

It is interesting that the Court of Appeals of New York observed that "the question [of "beyond a reasonable doubt"] was not decisive in *United States v. Costanzo* (395 F. 2d 441), where the judgment of adjudication was affirmed, and the Trial Judge had applied what the court regarded as a proper standard of proof." *In the Matter of Samuel W.*, 247 N.E. 2d 253 (Opinion of March 6, 1969).

Holding to the contrary are the highest courts of New York, California and Oregon and the Court of Appeals for the District of Columbia. In *In re Wylie* (D. C. App. 1966), 231 A. 2d 81, that court, after reviewing *Gault*, concluded that, "we adhere to our ruling in *In re Bigesby* * * * that 'the strictly criminal law concept of guilt beyond a reasonable doubt' is unnecessary and improper in a Juvenile Court proceeding." That same court has very recently reaffirmed the holding of Wylie in *In re Ellis*, 253 A. 2d 789, 5 Cr.L. 2205 (May 1969). The court there held:

> "While we have not failed to follow the ruling of Gault in those cases where it clearly applies, Gault

did not decide the question of the quantum of proof required in juvenile cases. We are therefore not persuaded at this time that we should apply the philosophy of Gault in order to predict what that Supreme Court might decide if faced with the same question. We are reluctant to condemn or abandon a longstanding and useful practice unless the unconstitutionality of that practice is plain and manifest. [citing case]

"Concededly there are points of similarity between a juvenile proceeding and a criminal trial. Nonetheless, hearings held before the Juvenile Court remain civil in nature and differ significantly from their criminal counterpart. By statute, the records of juvenile cases are not open to public inspection. Hearings are also closed to the public. Furthermore, a child adjudged delinquent is neither deemed nor treated as a criminal. No civil disabilities are imposed upon him and he is not disqualified from civil service. The purpose and rationale behind such safeguards and, indeed, the very procedure governing treatment of such juveniles is the care, needs and protection of the minor and his rehabilitation and restoration to useful citizenship. [citing authority] A flexible approach to juvenile proceedings is the best manner in which to achieve these ends. The safeguards which surround him do not inherently derive from the Constitution but from the social welfare philosophy which forms the historical background of the Juvenile Court Act.

"Subsequent to the Gault decision, we held occasion to deal with the same question presented on this appeal. In re Wylie, D.C. App., 231 A. 2d 81, 84 (1967). There we noted that, although Gault had al-

luded to but not passed upon the standard of proof required in Juvenile Court cases, we determined to adhere to our prior ruling in In re Bigesby, D.C. App., 202 A. 2d 785, 786 (1964), that 'the strictly criminal law concept of guilt beyond a reasonable doubt' was unnecessary and improper in a Juvenile Court proceeding. We find no justification for abandoning or revising that ruling under the facts and circumstances of this case. As was stated in Creek v. Stone, 126 U.S. App. D.C. 329, 379 F. 2d 106, 1 Cr. L. 2055 (1967), the clear congressional purpose was to establish a professionally staffed, specialized court, equipped with broad powers to implement the rehabilitative purposes of the Juvenile Court Act."

In May of this year, the Oregon Supreme Court made a similar holding in *State v. Arenas,* 453 P. 2d 915, 5 Cr.L. 2243. It observed that individual writers, agencies and commissions had differed on the advisability of such a quantum of proof as a requirement. It concluded:

"If the constitution requires that a juvenile cannot come within the jurisdiction of the court unless criminal conduct is proved beyond a reasonable doubt, the great juvenile experiment is over.

"If such a burden of proof is constitutionally required, it logically follows that subsections (b), (c) and (f) of the statute are in violation of the constitution. Such subsections do not describe conduct which is necessarily criminal. These subsections concern delinquency, not child dependency. In the event the court finds such conduct has occurred, the legislature has empowered the juvenile court to deprive

the juvenile of his freedom if that is believed desirable. ORS 419.509.

"If the Constitution is held to prohibit the juvenile court from depriving a juvenile of his freedom unless it is proved beyond a reasonable doubt that he committed a criminal act, the Constitution would have to be interpreted to prohibit depriving a juvenile of his freedom when he was found to have engaged in conduct not amounting to a crime.

"The logical end of such reasoning would be the conclusion that regardless of how apparent the need for intervention for the good of the child, the community, the judiciary and every other institution or agency would be powerless to act until and unless criminal conduct could be proved beyond a reasonable doubt.

"We are of the opinion that such a result is not a requirement which logically extends from Guilt."

The highest court of New York painstakingly reviewed the history of the problem in the light of *Gault* in *In the Matter of Samuel W.*, 247 N.E. 2d 253 (Ct. of App., March 6, 1969). The opinion recognizes a distinct need for a separate type of hearing or trial for minors, and that "[N]othing could be farther removed in temper and purpose than this [juvenile proceeding] from the criminal court for adults." It observed that the juvenile court system "has had the singular misfortune of being impaled on the sharp points of a few hard constitutional cases" such as *Gault* and *Kent v. U.S.*, 383 U.S. 541 (1966). It is observed that hard cases were easily dramatized, but that they "were

not typical of the vast mass of juvenile proceedings in the United States."

On the particular point as to the constitutionality of the New York Family Court Act which prescribed a preponderance of the evidence standard, the Court held:

> "It is not easy to define for the purposes of practical application the tenuous difference between 'beyond a reasonable doubt' as a quantitative or qualitative test of proof, and 'by a fair preponderance of the evidence'. It is enough to say that for a very long time one has been used in the criminal law and the other in civil law, and that the profession accepts the view that beyond a reasonable doubt is a 'higher' standard.
>
> "But the standard is in the present case expressly stated by statute; and, indeed, by a statute which goes very far in providing due process safeguards for children in delinquency proceedings in Family Court. The delinquency status is not made a crime and the proceedings are not criminal. There is hence no deprivation of due process in the statutory provision, and, since the proceeding is quite different from a criminal prosecution, it seems reasonable to think there is no substantial equal protection question in the case.
>
> "The decision in *Gault*, in which there was almost a total absence of due process, is not necessarily to be read as an interdiction of this standard of proof required by the New York statute. It is not an absence of procedural due process that a noncriminal status determination have a different measure of proof than that required for conviction of crime.

The California Supreme Court squarely confronted the problem in *In re Dennis M.*, 450 P. 2d 296 (Feb. 1969). It held, with one judge [Peters] dissenting, that *Gault* did not require "beyond a reasonable doubt." The opinion states:

> "We meet at the outset a contention advanced by appellant at oral argument: i.e., that the United States Supreme Court decision in In re Gault . . . compels the state to establish the facts supporting a charge of juvenile delinquency by the criminal standard of proof 'beyond a reasonable doubt.' We do not so read *Gault*. It is true, of course, that the decision inaugurated a sweeping constitutional reform of the rights of juveniles in this country. It drew from the teaching of earlier cases the fundamental proposition that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone' . . . and laid down specific guidelines for implementing those guarantees in juvenile proceedings. Yet in so doing the court took repeated pains to limit its holding by warning that 'We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relatonship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." . . . First, the decision was intended to affect only the adjudicatory state of juvenile proceedings, and then only when the outcome may be commitment to a state institution. . . . Secondly, the court made it clear that even if the foregoing conditions are met, the Constitution does not require that the full panoply of rights accorded to an adult accused of crime be erected in the juvenile court. . . . Rather, the opinion . . . adopts for juvenile court

adjudications of delinquency the holding of Kent v. United States . . ., that 'the hearing must measure up to the essentials of due process and fair treatment.' Those essentials, as the remainder of the opinion spells out, are (1) adequate notice of the charges, (2) assistance of counsel, (3) opportunity for confrontation and cross-examination, and (4) the privilege against self-incrimination. . . .

" . . .

"We infer that at least for the present the Supreme Court has left this matter to the states and the lower federal courts. . . .

" . . .

" . . . We do not deny that *Gault* casts doubt on the traditional *parens patriae* theory, and exposes many defects in its practice; but we also take the high court at its word when it reiterates that under the Constitution the juvenile court hearing need not 'conform with all of the requirements of a criminal trial or even of the usual administrative hearing' . . .

Indeed, the opinion is replete with language admonishing that the new rules there laid down should not be taken to spell the end of the juvenile court process per se, and that many of its unique attributes can and should be preserved. . . .

"Although the consequences of adopting the reasonable doubt standard in juvenile court would perhaps be less drastic than adopting a jury system, to do so would nevertheless introduce a strong tone of

criminality into the proceedings. The high degree of certainty required by the reasonable doubt standard is appropriate in adult criminal prosecutions, where a major goal is corrective confinement of the defendand for the protection of society. But even after *Gault*, as we have seen, juvenile proceedings retain a *sui generis* character: although certain basic rules of due process must be observed, the proceedings are nevertheless conducted for the protection and benefit of the youth in question. In such circumstances, factors other than 'moral certainty of guilt' come into play: e. g., the advantages of maintaining a non-criminal atmosphere throughout the hearing, and the need for speedy and individualized rehabilitative services. Indeed, the youth's alleged crime may often be only the latest or most overt symptom of an underlying behavioral or personality disorder which could equally well warrant a declaration of wardship pursuant to other provisions of the code. Thus a determination whether or not the person committed the particular misdeed charged – although the very heart of an adult criminal prosecution – may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best interests of the youth may well be served by a prompt factual decision at a level short of 'moral certainty.' "

In *DeBacker v. Brainard*, 161 N.W. 2d 508 (Neb. Sup. 1968), the question discussed at length and with vigor was whether, under *Gault*, there is a constitutional requirement of a trial by jury, a problem not relevant here since Santana had a jury. The *DeBacker* opinion in its final paragraph, however, also says that four [of the seven] judges were of the opinion that a commitment in a juvenile

proceeding must be proved, as in criminal cases, beyond a reasonable doubt; and that the Nebraska statute providing for "a preponderance of the evidence" was unconstitutional. Three of the seven judges thought the "preponderance of the evidence" statute was constitutional. However, a provision of the Nebraska Constitution says that no legislative act shall be declared unconstitutional "except by the concurrence of five judges." So the holding of *DeBacker* is that the "preponderance of the evidence" juvenile statute is constitutional, even though the judges stood 4 to 3 to the contrary.

On February 24, 1968, the United States Supreme Court noted probable jurisdiction in the *DeBacker* case, and the case was placed on the summer calendar. 21 L.Ed. 770. While a main problem in *DeBacker* is right to a trial by jury, the Supreme Court will have the opportunity also to pass upon the other point, "beyond a reasonable doubt."

We recognize able arguments and writings on both sides of this question. We have concluded that *Gault* does not require that the juvenile trial be adversary and criminal in nature, and that the "beyond a reasonable doubt" test is not required. We are therefore persuaded to follow the reasoning of the opinions of the Court of Appeals of the District of Columbia, and the highest courts of New York, California and Oregon.

The other point is that the State could not amend its petition before trial. The State first filed its petition on December 13, 1966, alleging that Santana had committed an assault with intent to rape. Santana pleaded a denial to the charges and alibi; i.e., he was at home with his family when the alleged event took place. On February 2, 1967, the day of the trial, the State amended its petition

to change its allegation from assault to rape to the charge of rape.

Santana objected in writing to the amendment. The trial judge qualified the written objection as follows:

> "The above and foregoing objections to State's Trial Amendment, having been duly and timely presented to the Court before any pleadings were read to the jury, and having been considered by the Court, the said objections as above stated are hereby qualified by the Court as follows:
>
> "Prior to the commencement of the hearing on February 2, 1967, and before the case had been called, the State filed said Trial Amendment now objected to, and the Court informed the child's counsel in open Court, that the Court would consider any objection, but that if counsel for the child were surprised and/or had not had time to prepare for the child's case, that the Court would continue this case and set it down for trial at a later time before a jury, and the child's counsel did decline to ask for a continuance of the trial of this case, and it proceeded to trial." [Tr. 10-11]

The point is this: in criminal cases, the State may not amend the substance of its charges. Article 28.10, Texas Code of Criminal Procedure. In civil cases, pleadings may be amended "at such time as not to operate as a surprise to the opposite party"; provided that if the amendment is tendered within seven days of the trial, leave to amend may be granted by the trial court "unless such amendment will operate as a surprise to the opposite party." Rule 63, Texas Rules of Civil Procedure. As we understand the

record in this case, the trial court offered Santana a postponement of the trial if he was surprised or needed additional time to prepare his case, and counsel did not request a postponement. He apparently chose to stand on the rule of criminal procedure that no amendment was permissible.

Holding as we have that juvenile proceedings are not strictly adversary criminal proceedings but are, under *Gault, sui generis* and to be tried under our statutes as civil cases, it was not error for the court to grant the State the leave to amend. And, under *Gault*, it is our opinion that the granting of the leave to amend, while at the same time offering Santana an opportunity to postpone the trial to some later date if he so desired, did not deprive the minor of an essentially fair trial so as to offend the due process clause.

The judgment of the Court of Civil Appeals is reversed, and the judgment of the trial court is affirmed.

Joe Greenhill
Associate Justice

Opinion delivered:
July 23, 1969

Dissenting opinion by Associate Justice Pope in which Associate Justices Smith and Steakley join.

Dissenting opinion by Associate Justice Smith.

Dissenting Opinion

The question presented is whether George Rivera Santana, a fourteen year old boy, was entitled to be tried for

the offense of rape, at the adjudicatory stage of a delinquency proceeding, under the quantum of proof beyond a reasonable doubt, instead of by the preponderance of the evidence. The court of civil appeals reversed the trial court's judgment because Santana was not tried by the reasonable doubt measure of proof. 431 S.W. 2d 558. I would affirm the judgment of the court of civil appeals.

A delinquent child is, among other statutory definitions, one who, within age limits, "violates any penal law of this State of the grand of felony." Sec. 3, Art. 2338-1, Vern. Tex. Civ. Stats. The definition of a felony is found in the Texas Penal Code and is one which "may — not must — be punishable by death or by confinement in the penitentiary . . . " Art. 47, Vern. Tex. Penal Code. The issue submitted to the jury in the adjudication of Santana asked, "Do you find from a preponderance of the evidence that George Rivera Santana raped Frone Mintz at the time and on the occasion in question?" The court instructed the jury that " 'rape,' as used in this charge is a violation of the penal law of this State of the grade of a felony. You are further charged that 'rape' is the carnal knowledge of a woman without her consent, obtained by force or threats." Then followed instructions about "force," "threats," "consent," and "alibi." Following the trial, Santana was committed to the Texas Youth Council, thence to confinement and treatment. This is the nature of this "civil" trial.

The Adjudicatory Stage

A correct decision requires us to focus upon the stage of the juvenile proceeding with which we are dealing. Settled practices recognize three stages in juvenile pro-

ceedings, (1) the intake, (2) the adjudicatory hearing, and (3) the disposition. The first stage is the pre-judicial or intake stage, at which time juvenile authorities are confronted with and handle, for varying periods of time, cases of all kinds – truancy, insolence, smoking, runaways, morals, misdemeanors, felonies. The second stage is that of adjudication, the purpose of which is to determine judicially the truth of the allegations in a petition in delinquency. The thir dstage, disposition, is the process in reaching a considered judgment of the best method for handling the child adjudged a delinquent. See, In the Matter of J.F., 17 Ohio Misc. 40, 242 N.E. 2d 604 (1968).

To accomodate the aims of juvenile philosophy with realities, it is important that one recognize the significant difference in juvenile procedures between the intake stage up to the adjudicatory hearing and the procedures required at the adjudicatory or judicial stage. The U.S. Supreme Court, in In re Gault, 387 U.S. 1 (1967) carefully limited its decision to the adjudicatory stage, saying:

> "We do not even consider the entire process relating to juvenile 'delinquents. 'For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process . . . We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to the proceedings, there appears to be little current dissent from the proposi-

tion that the Due Process Clause has a role to play." 387 U.S. at 13.

The court also carefully distinguished non-criminal misconduct and conduct, which, if done by an adult would be criminal. It made a third distinction, that of a disposition by commitment to an institution and a disposition other than a deprivation of liberty:

> "We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them. . . . " 387 U.S. at 41.

By this process the court looked at the judicial stage of the proceedings and the sanctions imposed rather than the State's good motives. Cadena, Due Process and the Juvenile Offender, 1 St. Mary's Law Review, 23, 28.

Santana is located at the same stage as was Gault, at the adjudicatory stage, with a felony charged, which resulted in the loss of liberty by commitment to an institution. We are not, therefore, concerned with any limitations upon care, counseling, treatment, rehabilitation, or other beneficences which he might have received and during some period of the first or third stages. Our concern is not with juvenile philosophy generally. Our concern is whether Santana has, in fact, been judicially found to be a delinquent according to due process. He declares he is innocent of the charge of delinquency; and upon principles of justice, fairness, and equal treatment that others re-

ceive when charged with rape, that he neither needs nor deserves the State's benevolence.

To hold that an act of the Legislature settles this case because it says that juvenile misconduct is a civil or a non-criminal proceeding is too easy an answer. Gault faced this issue squarely, and held that labels one way or the other were inconclusive. It did not jettison the juvenile philosophy of treatment and rehabilitation. It recognized that there is room for the benefits of juvenile procedures which classify as non-criminal a juvenile who is adjudged delinquent. The court expressly emphasized that a delinquency adjudication did not operate as a civil disability or disqualify him for civil service appointment. Following those statements, the court said, "*There is no reason why the application of due process requirements should interfere with such provisions.*" (Emphasis added).

General Acceptance of Gault

Gault has had a great impact upon all professionals interested in juvenile behavior. Juvenile courts have begun to take their correct posture as courts, and rights of juveniles have been brought back into the mainstream of fairness under our received principles of due process. The decision in Gault has met with general approval, except for the consensus that it should have come sooner. In proper perspective, " . . . courts do not solve problems; they resolve issues. As long as it remains a court, the juvenile court must be limited to this role." Tenney, *The Utopian World of Juvenile Courts*, Vol. 383, The Annals of the American Academy of Political and Social Science. Paul Tappan was among the first who questioned irregular and loose practices in handling juveniles. He wrote in

1949 in *Juvenile Delinquency:* "The presumption is commonly adopted that since the State has determined to protect and save its wards, it will do no injury to them through its diverse officials so that these children need no due process protection against injury. Several exposures to court; a jail remand of days, weeks, or even months; and a long period in a correctional school with young thieves; muggers, and murderers – these can do no conceivable harm if the State's purpose be beneficent and the procedure be 'chancery'. Children are adjudicated in this way every day without visible manifestations of due process. They are incarcerated. They become adult criminals, too, in thankless disregard of the State's good intentions as *parens patriae.*"

Scholars, who work in the field of juvenile offenders, are harmonious in their views that Gault was long overdue. Some of their conclusions are collected in the transcript of recent programs sponsored by The Institute of Continuing Legal Education, published in the volume entitled, *Gault: What Now for the Juvenile Court?* (1968). Norval Morris, Professor of Law and Criminology, University of Chicago, said: "What I have anxiety about are the reality problems which develop when these types of rescue operations become institutionalized. What happens is that rescue operations are likely to ignore the preferences of those who are to be rescued. * * * If an inquisitorial, non-adversary system is right for children, why is it not right for adults? If benevolence is what guides us, why should benevolence stop short wtih children? The case was not easy to make even before Gault, but certainly after Gault it is impossible."

Henry H. Foster, Professor of Law, New York Univer-

sity, said: "The commendable objectives of juvenile court legislation, whether illusory or not, never did justify the abandonment of the accumulated wisdom and experience of the common law." He quotes Gault for the idea that the informal procedures, "contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by seemingly all-powerful and unaccountable exercise of authority by judges and probations officers." He concludes:

> "The infatuation of law with behavioral science has not been a happy one whenever law has forsaken her traditional character. A court is a court is a court. Dignity, decorum, fair procedure, and tradition are essential to and expected of the judicial process.
>
> "• • •
>
> "In retrospect, it seems incredible that we should ever have abdicated the judicial function of fact finding or have departed from the lessons every real lawyer knows in his bones. Moreover, it is not good social work, criminology, or psychiatry to treat people unfairly, to deny them due process, or to deprive them of a fair hearing."

Robert D. Vinter, Associate Dean and Professor of Social Work, School of Social Work, University of Michigan said: "If it did nothing else, however, Gault affirmed that juvenile proceedings cannot be justified as feasting on a different kind of law and thereby immune from the requirements of due process and constitutional privileges."

These conclusions had been published in the *Report of*

the President's Commission on Law Enforcement even before Gault. Instead of getting children into juvenile court to help them, the Report concluded that the pronouncement of delinquency should be used only as a last resort, and it recommended that the range of conduct for which courts intervene should be narrowed. "Serious consideration, at least, should be given to complete elimination of the court's power over children for non-criminal conduct." But, when a case does reach court level, the Report said:

> "Court adjudication and disposition of those offenders should no longer be viewed solely as a diagnosis and prescription for cure, but should be frankly recognized as an authoritative court judgment expressing society's claim to protection . . . Accordingly, the adjudicatory hearing should be consistent with basic principles of due process."

A juvenile court, therefore, which works with juveniles at the adjudicatory stage, is at last a court; a court which sits to resolve issues under principles of due process, which is the best method yet devised for fair play. Gault accords a juvenile at the adjudicatory stage the due process rights to notice, counsel, confrontation and cross-examination, and the privilege against self incrimination that any other person charged with a felony receives. In according these rights and privileges Gault took not of "the awesome prospect of incarceration in a State institution," and so did Kent. It took notice of the proceeding in which "the issue is whether the child will be found to be 'delinquent' and subjected to the loss of liberty for years." It said "There is no difference in this respect between adult and juvenile proceedings *of the sort here involved*." (Emphasis added)

The Reasonable Doubt Rule and Due Process

The real question then is not what is best for Santana; it is whether the reasonable doubt standard in a proceeding of a felony grade which may lead to a deprivation of liberty, is a part of due process. Why does the law recognize a division in standards of proof? The reasons for the "preponderance of evidence standard are found in the policy of the law to indulge no presumption in favor of either party to a dispute of a civil nature, or one between persons or entities in cases involving pecuniary damages or civil status, when, even in the event of loss, the party may retrieve his loss by his future efforts. Criminal cases have required the presumption of innocence as well as the greater measure of proof bcause the law has learned that one's liberty, reputation, future livelihood, career, or even one's life may depend upon the outcome. It is for that reason that one is presumed innocent of crime; while a civil litigant is not presumed correct in his claim or defense. See Underhill, Criminal Evidence, 4th Ed. § 7, (1935). "This rule is obviously based upon broad principles of humanity, which forbid the infliction of punishment until the commission of the crime is to a reasonable certainty established. It has received the sanction of the most enlightened jurists in all civilized communities, and in all ages; and with the increasing regard for human life and individual security, it is quite apparent that the energy of th rules in no degree impaired." 30 Am. Jur. 2d. Evidence, § 1170.

A jury, and a reviewing court perform differently when testing a record under the two rules. Under the preponderance of the evidence standard, a finding may be supportable as tipping the scales even by weak circumstances, so

long as the inferential leap is not too great. A search of the record for direct evidence or strong circumstances is the limit of a review. A trial by the reasonable doubt standard compels a conviction of the mind. Here a search of the record of evidence which compels a moral, not an absolute, certainty of the truth is required.

An adult charged with a felony, "however degraded or debased he may be, and no matter what may be the enormity of the crime charged against him, must always be presumed innocent of the crime for which he is indicted until his guilt is proved beyond a reasonable doubt." Underhill's Criminal Evidence, § 41 (4th ed. 1935); Powell v. State of Alabama, 287 U.S. 45 (1932). Such is the rule in all states of this Union. Few precedents concerning the rule have been written by the United States Supreme Court, which is understandable because of the universality of the principle. Coffin v. United States, 156 U.S. 481 (1894), traces the rule to the common law as well as the Roman law. Mr. Justice White wrote the opinion, and while his historical research has been criticized by Thayer in his, "A Preliminary Treatise on Evidence at the Common Law," (1898), at pages 551-576; Thayer attributes substantially the same statement of the rule of presumptive innocence to Bracton as early as 1260, and also to a number of later English decisions. Thayer, supra, 553. Cf. IX, Wigmore on Evidence (§§ 2497, 2498, 3rd ed. 1940). In 1958 the United States Supreme Court said in Speiser v. Randall, 357 U.S. 513 (1958):

> "Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden

> of producing a sufficiency of proof in the first instance, and of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the fact-finder of his guilt." 357 U.S. 513 (1958).

In Brooks v. United States, 164 F.2d 142 (5th Cir. 1947) the court said:

> "[D]ue process as to each defendant required for a conviction that the evidence be strong enough to exclude every other reasonable hypothesis than the guilt of that defendant of the precise conspiracy charged."

United States v. Costanzo, 395 F.2d 441 (4th Cir. 1968), in discussing the standard of proof required in a juvenile case, discussed the "reasonable doubt" standard and said it was a part of due process. Its language is instructive:

> "For nearly two centuries this higher standard of proof required in criminal cases has been recognized as a basic procedural safeguard and has been adopted by virtually every jurisdiction in this country. See IX, Wigmore on Evidence, § 2497 (3rd ed., 1940, Supp. 1964); see also McCormick, Evidence, § 321 (1954). The Supreme Court has terms the Government's every obligation to prove every element of the offense beyond a reasonable doubt 'a settled standard of the criminal law.' Holland v. United States, 348 U.S. 121, 138, 75 S. Ct. 127, 137, 99 L. Ed. 150 (1954). In Bringar v. United States, 338 U.S. 160, 174, 69 S. Ct. 1302, 1910, 93 L. Ed. 1879

(1949), the Court observed that, 'Guilt in a criminal cause must be proved beyond a reasonable doubt,' and explained that requirement in Speiser v. Randall, 357 U.S. 513, 525-526, 78 S. Ct. 1342, 2 L. Ed. 2d 1460 (1957), noting: 'Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – ° ° [the Government has the burden] of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.' *A juvenile's liberty demands no less protection.*" (Emphasis added).

Unsettled State of The Law

Juvenile cases, decided after Gault, have not been consistent in their decisions concerning the measure or proof. Some have held the reasonable doubt rule should be followed, either because of due process or upon principles of equal protection. In re Urbasek, 38 Ill. 2d 535, N.E. 2d 716 (1968); United States v. Constanzo, 395 F. 2d 441 (4th Cir. 1968). Others have approved the preponderance of the evidence standard. In re Dennis M., 450 P. 2d 296 (1969); In re Ellis, 253 A. 2d 789 (D.C. App. 1969); In the Matter of Samuel W., 24 N.Y. 2d 196, 299 N.Y. Supp. 2d 414, (N.Y. Ct. App. 1969); In re Agler, 15 Ohio App. 2d 240, 240 N.E. 2d 874 (1968); State v. Arenas, 453 P. 2d 915 (Ore. 1969). A plethora of law review articles and notes is equally in disagreement.

One case needs discussion, since its history is the occasion for this opinion. This court at first refused the appli-

cation for writ of error and approved the decision of the court of civil appeals which held that the standard for proof in juvenile adjudicatory hearings was the reasonable doubt rule. After the United States Supreme Court noted probable jurisdiction in DeBacker v. Brainard, 183 Neb. 461, 161 N.E. 2d 508 (1968), we granted the writ in this case. In my opinion DeBacker should be reversed without regard to the question about standard of proof. The court wrote twelve pages about the right of Nebraska to deny a juvenile a jury trial and one casual paragraph about the standard of proof. Santana had a jury trial and that point is not before us. The majority of the court in DeBacker correctly held that the proof should be beyond a reasonable doubt. The majority also held that the juvenile was entitled to a jury trial. However, the Nebraska Constitution requires more than a mere majority to declare a law unconstitutional, so, notwithstanding the majority views, that view failed, and the juvenile wound up without a jury trial and without a trial by the reasonable doubt rule. Where are we? The majority upheld both of the juvenile's contentions, yet had to deny them. Moreover, the minority but prevailing view was voiced in an opinion which picked a fight with the Supreme Court about Gault. Sound reasons existed for the Supreme Court's taking jurisdiction of the DeBacker case. The Supreme Court, either in that case or this one, can settle this problem.

Liberty is our real concern. Perhaps no greater harm could come to Santana than the State's misguided efforts to rehabilitate him if, in fact, he is innocent to begin with. His plea is that he wants fairness first; therapy second. With equal logic, one could have reasoned before Gault that the benefits of treatment accorded a juvenile

are so helpful and beneficial to the juvenile that the State can be careless in notifying him or his parents about the offense, or providing him a lawyer, or permitting hearsay from an absent complainant, or by tolerating his self incrimination. The rights which Gault accords a juvenile reduce the chances for unfairness and injustice. The reason for the reasonable doubt rule is no different.

The Uniform Juvenile Court Act, as finally drafted and adopted in August, 1968, like Urbasek, in my opinion, follows the spirit of fairness which surfaced after six decades, in Gault. It would require proof beyond a reasonable doubt. Section 29b of the proposed act provides.

> "If the court finds on proof beyond a reasonable doubt that the child committed the acts by reason of which he is alleged to be delinquent or unruly it shall proceed immediately or at a postponed hearing to hear evidence as to whether the child is in need of treatment or rehabilitation and to make and file its findings thereon. In the absence of evidence to the contrary evidence of the commission of acts which constitute a felony is sufficient to sustain a finding that the child is in need of treatment or rehabilitation. If the court finds that the child is not in need of treatment or rehabilitation it shall dismiss the proceeding and discharge the child from any detention or other restriction theretofore ordered."

The Texas Juvenile Act does not provide for adjudications of juveniles by the preponderance of the evidence rule, and no decisions of this court have so held. Generally it has been held by this court, that while constitutional rights of juveniles must be protected, procedures should be those used in civil cases. State v. Thomasson, 154 Tex.

151, 275 S.W. 2d 463 (1955); Dendy v. Wilson, 142 Tex. 460, 179 S.W .2d 269 (1944). This court can and should accord the fairer and more protective rule of reasonable doubt without impairing the Juvenile Law and the philosophy of our former opinions even though the Supreme Court should ultimately hold that a preponderance of the evidence is satisfactory in delinquency trials.

I would hold that a juvenile, at the adjudicatory stage, when his liberty is at issue, has the right to have his denial of the accused act tested by the standard, beyond a reasonable doubt. I would affirm the judgment of the court of civil appeals.

Jack Pope
Associate Justice

Associate Justices Smith and Steakley join in this dissent. Opinion delivered July 23, 1969.

DISSENTING OPINION

I am in perfect agreement with Mr. Justice Pope's dissenting opinion wherein he challenges the holding of the Court that the preponderance of the evidence standard is to be applied in determining the question of whether a minor charged with a major crime, as here, is a delinquent. This dissent is concerned only with a question not discussed, which is whether or not the Respondent, George Rivera Santana, has been afforded constitutional procedural due process where, admittedly, the Petitioner, The State of Texas, was permitted over objection to file

a Trial Amendment on the day of trial, whereby the offense originally charged, that of assault with intent to commit rape, was abandoned and for the first time, the Respondent was charged in the pleadings with the greater offense of rape. As stated in the Court's opinion, the State first filed its petition on December 13, 1966, alleging that Santana had committed an *assault with intent* to rape. Thereafter, the State filed two amended pleadings alleging the same act of delinquency, i.e., assault with intent to commit rape. No objection was lodged against these amendments. However, the following proceedings demonstrate conclusively that Santana was deprived of the safeguards afforded by the Bill of Rights, especially notice as provided in the Sixth Amendment. The record shows that Santana was charged with an infamous crime, rape, and put to trial without adequate notice, on February 2, 1967. Prior to that date, the State's pleadings charged that Santana "has heretofore, in Lubbock County, Texas, on the 8th day of December, 1966, violated a penal law of this State of the grade of a felony, in and upon Frone Mintz, a woman, did make an assault with the *intent then and there to commit the offense of rape* upon Frone Mintz by then and there without the consent of the said Frone Mintz *attempt by force, threat, and fraud*, to have carnal knowledge of her, the said Frone Minz." Emphasis Added.

On February 2, 1967, the date of trial, the trial court, over objection, permitted the State to file a trial amendment so as to allege the following:

> "The said child is a delinquent child by reason of the existence of the following facts: The said George Rivera Santana has heretofore, in Lubbock County, Texas, on the 8th day of December, 1966, violated a

> *penal law* of this State of the *grade of a felony*, in and upon Frone Mintz, a woman, with the intent then and there commit the offense of rape upon Frone Mintz by then and there, without consent of the said Frone Mintz, by force and threats, have carnal knowledge of her, the said Frone Mintz." Emphasis added.

The prayer following this charge reads, in part:

> "Wherefore, premises considered, it is respectfully prayed that this cause be set down for a hearing on some day and date, and at a place to be fixed by the Court, ..."

The trial court, in lieu of setting the hearing sufficiently in the future to give Santana proper notice and time to prepare his defense to the new penal offense, overruled Santana's objections and exceptions to the filing of the trial amendment and proceded with the trial on February 2, 1967. The objections were:

> "George Santana would further object to the amendment of said charge for the reason that said petition charging him with said offense [rape] was never served upon him prior to the time this case was called for trial, and therefore, has had insufficient time to prepare said case, and the said George Santana claims surprise, and for said reason said George Santana is prejudiced, and unable to adequately prepare his defense to same."

The trial court attached the following qualification to Respondent's Bill of Exceptions:

> "The above and foregoing objections to State's Trial

> Amendment, having been duly and timely presented to the Court, before any pleadings were read to the jury, and having been considered by the Court, the said objections as above stated are hereby qualified by the Court as follows: Prior to the commencement of the hearing on February 2, 1967, and before the case had been called, the State filed said Trial Amendment now objected to and *the Court informed the child's counsel in open court*, that the Court would consider any objection, but that if counsel for the child were surprised and/or had not had time to prepare for the child's case, that the Court would continue this case and set it down for trial at a later time before a jury, and the child's counsel did decline to ask for a continuance of the trial of this case, and it proceeded to trial. All of the above objections, as set out in the qualifications, having been considered by the Court, the same are overruled, to which action and ruling of the Court George Rivera Santana in open court, through his attorneys, expected." Emphasis Added.

This action of the trial court was harmful to the child involved in that the Court deprived Santana of a fair trial even under recognized Civil procedure much less under criminal procedure. Be that as it may, Respondent's exception to the qualification rendered the qualification ineffective. Therefore, the qualification should not prejudice Respondent's rights.

As said by Mr. Justice Black in his concurring opinion in *Gault*,

> "[t]he juvenile court planners envisaged a system that would practically immunize juveniles from 'punish-

> ment for crimes in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions. I agree with the Court however that this exalted ideal has failed of achievement since the beginning of the system.

This is true in the present case. There was no justification for the trial court, in open court, placing Santana in the position of acknowledging that he was guilty of rape. When the trial court stated in the so called qualification that counsel for Santana declined to plead surprise to the charge of rape, it very well created the impression that Santana knew from December 4, 1956 that he was guilty of rape even though he was only charged with assault with intent to commit rape. Under the theory that in civil cases pleadings in Texas may be amended "at such time as not to operate as a surprise to opposite party" provided that if the amendment is tendered within seven days of the trial, leave to amend may be granted by the trial court, "unless such amendment will operate as a surprise to the opposite party." Rule 63, Texas Rules of Civil Procedure. Santana has been convicted of a felony without regard to the Constitution which requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. The child was entitled to no less than that afforded an adult. While it is true that Santana had attorneys and had an adequate trial by jury in the sense that he was prosecuted under due process, nevertheless the power of the State denied to him the safeguards such as that which reads:

> "In all criminal prosecutions the accused shall enjoy the right ... to be informed of the nature and cause of the accusation."

He was deprived of the right to stand before a properly organized jury of his peers and in response to the Court's arraignment, plead "not guilty."

There is another feature of this case which needs emphasis. The State of Texas is Petitioner here. The record is here without a statement of facts. This Court has no way of knowing what prompted the State to change its pleadings. Did the alleged injured person relate facts to the officers in the first instance that excluded the offense of rape? Is it possible that she related facts showing that rape was committed, but the officials concluded to limit the charge to the lesser offense? Did she suddenly decide on February 2, 1967, nearly two months after the date of the alleged offense, to add to the story she first told? If this conviction is allowed to stand, the Court will never know the true answer to these questions. Santana, if tried under the procedure contemplated and specifically granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States, would have been in a rightful position to compel the State to discharge its burden of proving his guilt by legal and competent evidence beyond a reasonable doubt. It is argued that Santana did not request the Clerk to send with the record a statement of facts. That is just the point. No appellate court can adequately consider or should want to consider an appeal in a criminal case of this nature without a statement of facts. Whereas, in a civil proceeding, the parties are bound by the strict rules governing appeals.

The Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, reversed the judgment of the trial court on other grounds and did not pass

upon the question herein considered. However, the Court said:

> ". . . the Supreme Court in *Gault* clearly sets out the requirements of 'notices of charges' in the following language: 'Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity.' "

A continuance to a later date would have merely resulted in a trial under Civil rules wholly inadequate to meet the requirements of the Constitution of the United States.

This dissent seeks to supplement the forceful dissent filed by Mr. Justice Pope by bringing into focus a question which has been paramount from the beginning of this case. I believe it to be the law of the land that when a minor is charged with a crime, that minor is entitled to be tried by the same standards as an adult charged with the same or similar offense. It is incredible to believe that it was ever intended that juvenile procedings to determine delinquency, such as we have here, should be regarded as anything less than "criminal". This minor is entitled to be tried under the law of the land and not under "laws or proclamations specifically promulgated to fit particular cases or to attach new consequences to old conduct." As said in *Gault:*

> "It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement. In the first place, juvenile proceedings to determine 'delinquency,' which may lead to commit-

ment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination.

*[387 US 50]

To hold *otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings."

The procedure herein advocated can be adopted and at the same time be kept within the framework of the Juvenile Act of the State of Texas.

Finally, the Court states that Santana "pleaded a denial to the charges and alibi; i.e., he was at home with his family when the alleged event took place." This leaves the implication, at least, that since the defense was that of "alibi", Santana was prepared on February 2, 1967, to meet either charge. This does not necessarily follow. For example, the defense of "alibi" would not be inconsistent with the additional defense of impotence or some physical defect which would prevent the accomplishment of the crime of rape. Santana was not and should not be required to disclose before trial his defenses. Requiring a minor to file defensive pleadings is equivalent to compelling the juvenile, in effect, to testify against himself. The manner of trial of this case, relieved the State of its burden to establish the guilt of the respondent beyond a reasonable doubt.

For the reasons stated, I would affirm the judgment of

the Court of Civil Appeals which reversed the judgment of the trial court and remanded the cause to the lower court for a new trial.

.....

Clyde E. Smith
Associate Justice

Opinion Delivered: July 23, 1969

APPENDIX B

No. 7784

GEORGE RIVERA SANTANA, *Appellant*

vs.

THE STATE OF TEXAS, *Appellee*

June 24, 1968

This is an appeal from an order entered by the 99th District Court of Lubbock County, sitting as a Juvenile Court, pursuant to Article 2338-1, V.A.T.S., declaring appellant, a male fourteen years of age, a juvenile delinquent and committing him to the custody of the Texas Youth Council. Trial was before a jury.

On December 13, 1966 a petition was filed by the Lubbock County Attorney charging Santana with assault with intent to rape. A first amended petition was filed January 13, 1967 charging the same offense to have been committed on December 8, 1966 rather than on December 12, 1966. A second amended petition was filed January 17, 1967 charging the same offense but alleging in more particular the county in which the alleged offense was committed. No question is raised as to the service of these petitions on the parties hereto. On February 2, 1967, the date the trial was had, a "Second Amended Original Petition" was filed charging appellant with the offense of

rape. This is the pleading upon which the trial was held. In response to two special issues submitted, the jury found Santana guilty of rape, found him to be a delinquent child as defined in the court's charge to the jury.

Appellant's first point of error raises the question whether in a delinquency proceeding the continued use of the standard of proof by a preponderance of the evidence is permissible rather than beyond a reasonable doubt in view of the opinion of the United States Supreme Court in In Re: Gault 387 U.S. 1, 87 S.Ct. 1428, 18 L.ed 2d 527 (1967). It is appellant's contention the thrust of *Gault* in requiring the safeguards of notice of charges; right to counsel; right to confrontation and cross-examination and the privilege against self-incrimination requires the state to prove the elements of the crime charged in a delinquency proceeding beyond a reasonable doubt. His position is the refusal to require this quantum of proof is a denial of the due process of law. The decision in *Gault* did not directly pass upon this question of the degree of the burden of proof required in juvenile cases.

Since the enactment of the Juvenile Act, Article 2338-1, in 1943, the Texas courts have uniformly held that juvenile proceedings were to be conducted under the rules established for civil cases. Dendy vs. Wilson 142 Tex. 460; 179 S.W. 2d 269. Steed vs. State 143 Tex. 82; 183 S.W. 2d 458; State vs. Thomasson 154 Tex. 151; 275 S.W. 2d 463. The Juvenile Act makes no reference to the standard of proof required in delinquency cases. However, in accordance with the philosophy of the Juvenile Act, and in view of the established premise these proceedings were to be conducted as a civil proceeding rather than a criminal proceeding, our courts have consistently held the state

was only required to prove the act of delinquency by a preponderance of the evidence. State vs. Ferrell (Civ. App.) 209 S.W. 2d 642 (Ref. N.R.E.). Cantu vs. State (Civ. App.) 207 S.W. 2d 901. Robinson vs. State (Civ. App.) 204 S.W. 2d 981.

The purposes and basic philosophy of the Texas Juvenile Act has coincided with the general concept of juvenile proceedings in all states The idea of crime and punishment was abandoned and the child was to be rehabilitated in his own interest and in the interest of society. The basic philosophy has prevailed in practically every state jurisdiction until the United States Supreme Court handed down Kent vs. United States 383 U.S. 541; 86 S.Ct. 1045; 16 L.ed 2d 84. There the court considered the requirements for a valid waiver of the exclusive jurisdiction of the Juvenile Court of the District of Columbia in order that a juvenile could be tried in the District Court as an adult. The court held it was necessary that "the basic requirements of due process and fairness" be satisfied in considering the validity of such waivers of jurisdiction. The *Kent* decision was limited to a construction of the District of Columbia statute until the Supreme Court extended this holding to all juvenile proceedings. In Re: Gault, supra. As Mr. Justice Fortas said in *Gault:* ". . . while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults only". The court then held the essential elements of due process require that a juvenile proceeding must include notice of charges; the right to counsel; the privilege against self-incrimination and the right to confrontation and cross-examination of the witnesses. The court deemed there elements "critical-

ly important". Aside from the appellant's contention here that he did not have adequate notice of the charges against him, there is no contention the rights above required were not met in this case. As noted above, the *Gault* decision did not pass directly upon the exact question presented here, to wit: the quantum of proof required to validate a finding of delinquency. There the court used the following language in limiting the application of its decision:

> "We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relatonship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents'. For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. See note 48, infra. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a reslut of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to these proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play."

The elements of due process required by that decision all deal with the "proceedings" or hearing where a "determination is made as to whether a juvenile is a delinquent as a result of alleged misconduct on his part". The quantum of proof required to make a "determination" of the alleged delinquency is a vital element of that proceeding.

Although the court specifically considered "only the problems presented to us by this case" we conclude the underlying reasoning of *Gault* logically requires that a determination of delinquency is valid only when the facts of delinquency are proved beyond a reasonable doubt rather than by a preponderance of the evidence as now required by the present Texas decisions. We believe this is the clear and unmistaken effect of that decision. In so holding, we are in agreement with the interpretation of the *Gault* case by the Supreme Court of Illinois in In Re: Urbasek, 232 N.E. 2d 716. There the court held:

> ". . . it would seem that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged."

> "We need not be reminded that the *Gault* decision did not pass upon the precise question of the quantum of proof that must be shown to validate a finding of delinquency. We believe, however, that the language of that opinion exhibits a spirit that transcends the specific issues there involved, and that, in view thereof, it would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, whlie depriving these rights of their full efficacy by allowing a finding of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction. Since

> the same or even greater curtailment of freedom may attach to a finding of delinquency than results from a criminal conviction, we cannot say that it is constitutionally permissible to deprive the minor of the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults."

We therefore conclude, for the reasons herein stated, the appellant, having been proved delinquent by a preponderance of the evidence, was denied due process and equal protection guaranteed by the Fourteenth Amendment.

In view of our disposition of this case, it is not deemed necessary to consider appellant's other contention that he did not receive adequate notice of the charges against him, since it is unlikely the question would arise in a retrial. It is to be noted, however, the Supreme Court in *Gault* clearly sets out the requirements of "notices of charges" in the following language:

> "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'"

The record before us does raise the issue of waiver, however we do not believe it advisable, in view of a retrial, to discuss this aspect of the case.

The judgment of the trial court is reversed and the case is remanded to the District Court, sitting as a Juvenile Court, for a new trial.

James G. Denton, Chief Justice

APPENDIX C

SUPREME COURT OF TEXAS

October 1, 1969

No. B-1132.

The State of Texas

vs.

George Rivers Santana

From Lubbock County,
Seventh District.

Respondent's motion for rehearing, filed in the above numbered and entitled cause on August 7, 1969, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

* * *

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas in the case of The State of Texas vs. George Rivera Santana, No. B-1132, From Lubbock County, Seventh District, as the copy of such order appears in the minutes of said Court under the date of October 1, 1969.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this 20th day of October, 1969.

GARSON R. JACKSON, CLERK
By Eugene Cervenka, Deputy.